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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
 Annual Assessment of the) CS Docket No. 87-141
 Status of Competition in the)
 Market for the Delivery of)
 Video Programming)

REPLY COMMENTS OF LIFETIME TELEVISION

Lifetime Television ("Lifetime") hereby replies to comments submitted in response to the Commission's fourth annual inquiry into the status of competition in the market for the delivery of video programming. Lifetime has been a strong supporter of the Commission's efforts to promote competition and diversity in the programming market in the past and remains unwavering in support of those efforts today. As a result, Lifetime opposes the latest attempt by non-cable multichannel video programming distributors ("MVPDs") to expand the scope of the program access rules beyond that which Congress intended.¹ Not only have the comments provided no basis for expanding the rules, but Lifetime submits that expansion would have a detrimental impact on competition within the programming industry by altering the competitive marketplace and giving these distributors the same leverage over independent programmers that

¹ See, e.g., Comments of Wireless Cable Association ("WCA") at pp 13--14; Ameritech at pp. 14--19; BellSouth at pp. 10--16; and DIRECTV, Inc. at pp. 5--6, proposing expansion of the program access rules to cover non-vertically integrated programmers and terrestrially distributed programming. Some of these same commenters advocated coverage of non-vertically integrated programmers in the Commission's third Competition Inquiry in 1996 and, more recently, in response to a petition for changes in program access enforcement procedures filed by Ameritech, RM Docket No. 9097. Lifetime also opposed their efforts in the previous proceedings.

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the rules are intended to prohibit vertically-integrated cable operators from exerting. Finally, Lifetime supports the approach recommended by the National Cable Television Association with respect to video description.

1. Status of Competition in the Video Marketplace for Independent Programmers.

As an independent programming network that focuses on the unique needs and special interests of the female viewing audience, Lifetime is proud of the reputation it has established as a primary source of "Television for Women" and of its service to an audience segment that traditionally has been underserved by other programmers. In addition to a major commitment to public service programming typified by Lifetime's national breast cancer awareness campaign in which over 1,000 cable systems participated, Lifetime's newest division, Lifetime Sports, recently launched regular-season coverage of the Women's National Basketball Association (WNBA). In the months ahead, Lifetime Sports will feature other women's sporting events, continue to serve as a sponsor of women's sports and underwrite a women's sports scholarship program. With current distribution reaching over 68 million households, Lifetime ranks fourth among satellite-delivered program networks in total day household ratings and fifth in prime time ratings.²

From a competitive standpoint, it is significant that Lifetime is an advertiser-supported service, depending on advertising sales for approximately 75% of its revenues. Lifetime's continued ability to provide high-quality, original programming not available elsewhere therefore depends on a corresponding ability to distribute its advertisers' messages to the widest

² A. C. Nielsen Cable Network Audience Composition Report (2nd Quarter 1997).

viewing audience possible, regardless of the method of delivery. Having always made its programming available via direct broadcast satellite, home satellite dishes, wireless cable and local exchange carrier ("LEC") video distribution systems as well as on traditional cable television systems, Lifetime has supported and welcomed the growth of distribution alternatives to traditional cable.

Attaining and maintaining the level of distribution that has enabled Lifetime to provide its unique brand of programming has not come easily and continues to be a major challenge. In recent years, the tremendous proliferation of program networks in a market characterized by a rapidly dwindling supply of available channel space has resulted in fierce competition to secure "shelf space" in cable system channel line-ups. The demand for already scarce capacity is intensified by recent regulatory developments such as the successful defense of the must-carry rules against constitutional challenge and new rules making rates and conditions more favorable for users of commercial leased access. Such regulatory channel mandates have combined to disfavor, and sometimes displace, cable program services, including well-established and highly popular services such as Lifetime, with broadcast stations or leased commercial access. When operators are under pressure to make room for such regulatory mandated programming, services that are not affiliated with the operator tend to be more vulnerable to displacement. As a result, while Lifetime strongly supports the continuing vitality of a competitive marketplace and the growth and development of distribution outlets using a variety of technologies, Lifetime has serious reservations about the unintended consequences of additional regulatory intervention into the negotiation process between independent programmers and MVPDs.

2. A Review of the Marketplace in 1997 Reveals No Basis for Expanding the Scope of Program Access.

As the Commission reviews the record submitted in the current proceeding, it must continue to bear in mind that when Congress established a program access policy in the 1992 Cable Act, its intention was to promote competition to cable operators by restricting certain conduct among cable operators and their commonly-owned satellite programming networks.³ More recently, Congress revisited the scope of program access in including telco-owned programmers within the rules' coverage in the Telecommunications Act of 1996. This process afforded Congress the opportunity to expand program access to cover non-vertically integrated programmers; however, it did not do so. This legislative background demonstrates that with program access, Congress is not attempting to regulate the program marketplace *per se*. Instead, Congress is seeking only to facilitate competition in multichannel video distribution by curbing the incentive and ability of vertically integrated programmers to favor their affiliated cable or telco distributors over nonaffiliated distributors.

From both logical and practical perspectives, concern with restraining the leverage of cable or telco-owned programmers is unfounded as it relates to independent, advertiser-supported networks that are economically compelled to reach the largest possible audience regardless of the identity or technology of the distributor. As Lifetime has recognized, to survive and prosper, the independent programmer must market its services to all forms of distribution. That economic reality may account for the Commission's conclusion, in its *1996 Review*, that there was

³ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 at § 2, 106 Stat. 1460 (hereinafter "1992 Cable Act").

insufficient evidence to support certain non-cable MVPDs' attempts to expand program access beyond the scope that Congress originally intended.⁴

The economic incentives that exist for the independent programmer today have not changed appreciably from the incentives that existed when the Commission conducted its *1996 Review*. As a result of the must-carry decision, revised leased access rules and the lack of "going forward" incentives to operators for adding channels in 1998, channel capacity for independent programmers remains at a premium. As in 1996, evidence supporting governmental intervention in the business relationships between independent programmers and MVPDs remains negligible. Indeed, the only allegations of denial of access raised by commenters in the current proceeding relate to a few newly-launched independent services or regional sports services. Moreover, commenters urging expansion of the rules do not explain how their alleged inability to obtain certain program services impedes their ability to compete with cable operators. Rather, they point to a few isolated instances of new networks' allegedly entering into some form of exclusive distribution arrangement with cable operators in order to gain the carriage necessary to survive.⁵

The 1992 Cable Act was premised on allowing the marketplace, rather than regulation, to promote competition. Lifetime submits that there is no basis for the Commission to resort to

⁴ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133, Third Annual Report, FCC 96-496 (Jan.2, 1997) at ¶ 157 (hereinafter referred to as the "*1996 Review*").

⁵ Gaining carriage is so difficult in the current environment that the Commission has waived the program access rules on a limited basis even for vertically-integrated programming and requests for additional waivers are pending. *See, e.g., New England Cable News*, 9 FCC Rcd 3231, 3237 (1994). If even vertically-integrated start-ups are experiencing such difficulty getting initial carriage, access is likely to be even more problematic for independent networks.

regulatory intervention and alteration of the program marketplace, especially when doing so can lead to the unintended and troubling consequences discussed below.

3. Expansion of Program Access Would Produce the Unintended Consequences of Reducing Competition and Diversity Among Sources of Programming.

In the competition for carriage, independent programmers like Lifetime have been at a significant disadvantage. Independent networks do not enjoy the same expectation of access or favorable carriage conditions as Congress believed to be available to vertically-integrated program networks on commonly-owned cable systems. Expansion of program access would place independent programmers at a further disadvantage by giving non-cable distributors the same leverage in programming negotiations with independent programmers as those distributors attribute to vertically-integrated cable operators. Rather than negotiate at arms'-length with independent programmers, these distributors urge Congress to put them "on a level playing field" with cable operators by extending the advantage cable operators enjoyed during periods of little or no competition, all at the expense of independent programmers. In considering the comments, the Commission also must recognize that expansion of program access to independent programmers would impose additional burdens on their ability to function in a highly competitive market, and, ultimately, could lead to reduction in the number and diversity of programming sources available to the viewing public.

4. Video Description

In comments submitted in the Commission's recently concluded proceeding on closed captioning,⁶ Lifetime described its commitment to make its programming accessible to all

⁶ MM Docket No. 95-176.

members of the television audience. As many of the comments in the instant proceeding point out, however, the high costs and other obstacles associated with descriptive video service ("DVS") present a significant obstacle to the widespread use of this service at this time.⁷ In addition to the substantial costs associated with DVS, technical problems and copyright concerns would make it difficult for Lifetime to take on significant responsibilities for providing DVS for its programming in the near future. Although DVS requirements, like closed captioning, undoubtedly would be the legal responsibility of distributors, from both an economic and practical standpoint, programmers likely would bear the responsibility of providing DVS.

Concerns raised in the comments in this proceeding make it clear that the means of providing DVS developmentally and legally are well behind mechanisms for providing closed captioning. Further technological development and policy work in the area of copyright as well as communications law are needed before definite plans for implementing DVS can be explored. For these reasons, Lifetime joins the NCTA in recommending that the Commission allow cable networks to continue their voluntary efforts to provide enhanced services for customers with visual disabilities and to proceed with caution on this matter.

5. Conclusion

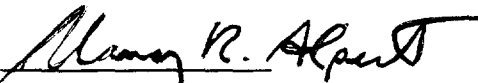
As the Commission found in its *1996 Review*, convincing support for expansion of program access beyond the scope that Congress intended simply does not exist. There is no compelling basis for the Commission to accede to requests to recommend such expansion in its report to Congress. Moreover, as Lifetime has pointed out, expansion of program access to non-

⁷ See, e.g., Comments of NCTA at p. 47; Motion Picture Association of America at pp. 3 and 6; and WGBH at p. 2.

vertically integrated programmers could bring about unintended and unfortunate consequences of reducing competition and diversity among programmers. For these reasons Lifetime opposes any effort to take program access beyond its originally intended role and urges the Commission to refrain from recommending any change in the current program access policy. In addition, Lifetime urges the Commission to proceed with appropriate caution with respect to accessibility of programming through DVS technology.

Respectfully submitted,

LIFETIME TELEVISION

By: 

Nancy R. Alpert
Senior Vice President, Business
and Legal Affairs
Lifetime Television
World Wide Plaza
309 West 49th Street
New York, New York 10019

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